

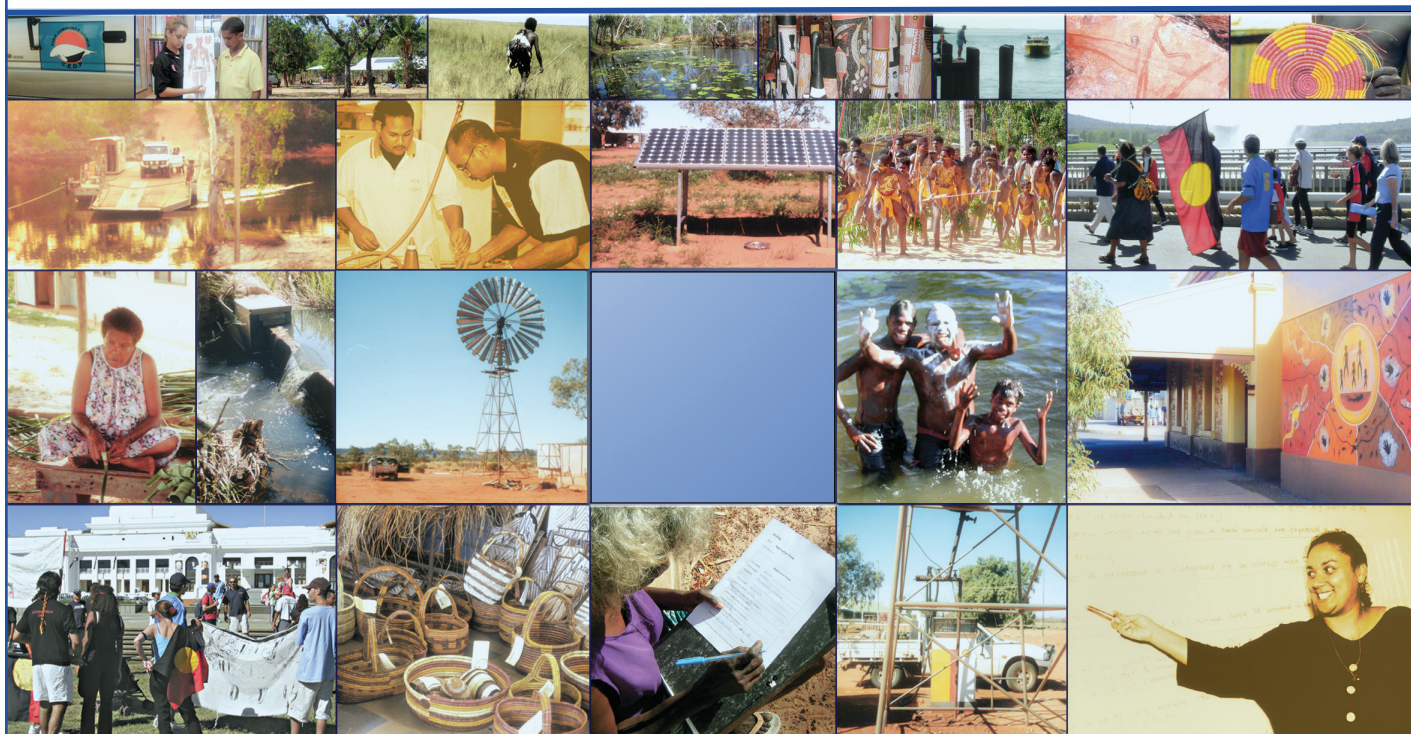
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Native Title and Taxation Reform

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A version of this Topical Issue was provided as a submission to the Australian Government's 'Native Title, Indigenous Economic Development and Tax' Consultation Paper of May 2010.

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OPENING REMARKS

This brief paper is adapted from a submission in response to the Australian Government's Consultation Paper 'Native Title, Indigenous Economic Development and Tax'.¹ It has similarities to an earlier submission that commented on the Australian Government discussion paper 'Optimising Benefits from Native Title Agreements' and 'The Report of the Native Title Payments Working Group'.² That submission was not made public by the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) but has been published electronically as [CAEPR Topical Issue No. 3/2009](http://www.anu.edu.au/caepr/).³ The earlier submission raises a number of issues of relevance to the current consultation process, most especially in relation to the historical lack of clarity since the 1950s about the nature of payments made in benefit sharing agreements with Indigenous Australians. I will not revisit these issues in any great detail here.

While the consultation paper under review is titled 'Native Title, Indigenous Economic Development and Tax', in fact it mainly canvasses options for income taxation reforms with very little actually said about Indigenous economic development. While clearly native title is *sui generis* as a form of land tenure in Australia, so are the diverse forms of land rights that exist in all States and Territories except Western Australia. Interestingly, in the case of land rights there is already a Mining Withholding Tax levied on 'mining payments' which is referred to very briefly in the consultation paper without any empirical or conceptual analysis of its efficacy or workability.

This paper raises four key issues and ends with a brief conclusion and five recommendations. The key issues are:

1. What is motivating the native title taxation reform process given that the recently completed (Henry) *Review of Australia's Future Tax System* made no mention of taxation of native title?⁴

1. Available at <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1809>.

2. Both available at http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenousslawandnativetitle_Nativetitle_DiscussionPaper-OptimisingbenefitsfromNativeTitleAgreements.

3. Available at <http://caepr.anu.edu.au/Publications/topical/2009TI3.php>.

4. Available at http://taxreview.treasury.gov.au/content/Content.aspx?doc=html/pubs_reports.htm.

FaHCSIA:

Department of
Families, Housing,
Community
Services and
Indigenous Affairs

2. What are the intersections between native title payments and the income tax system?
3. What are the lessons to be learnt from the operations of the Mining Withholding Tax?
4. What are the lessons to be drawn for tax policy making from the 2010 Resources Super Profits Tax debate?

It should be noted that this commentary draws largely on my own research on these issues from 1982 to the present. In referring mainly to this body of work I am assuming that other academics who have undertaken research in this area will also be making submissions on the Consultation Paper.

1. WHAT IS MOTIVATING THE NATIVE TITLE TAXATION REFORM PROCESS?

In his Foreword to the Consultation Paper, Senator the Hon Nick Sherry suggests that there have been concerns that the potential income tax implications of native title claims are complex and uncertain, and that in response the Government plans to consider options for reform in this area (p. v). I suspect that the Assistant Treasurer is actually referring here to the potential taxable income of a Prescribed Body Corporate or a Registered Native Title Body Corporate (henceforth PBC) rather than native title claims. But given that the *Native Title Act* was enacted in 1993 and that very many land use agreements have been signed and monetary and non-monetary benefits have been paid since then, it is unclear why the Australian Government has decided to look at this issue in May 2010.

Senator Sherry also notes that the Government is committed to a more flexible, less legalistic approach to native title that delivers practical outcomes for Indigenous Australians (p. v) or perhaps more specifically, native title parties. However, his suggestion that the tax system might play a valuable role in this area by ensuring the resolution of claims and the management of benefits under native title agreements is both unexplained and unsubstantiated in the Consultation Paper. Indeed the Consultation Paper proposes three approaches, the first of which, an income tax exemption, seems to directly contradict this proposition. The second approach, the establishment of an Indigenous Community Fund as a new tax exempt entity suggests that the threat of taxation might be used to influence how native title groups might expend their payments from native title agreements. The third approach, the establishment of a new Native Title Withholding Tax (NTWT) regime is in fact the only taxation proposal in the Consultation Paper.

I make three observations at the outset.

First, it is unclear why the recently completed (Henry) *Review of Australia's Future Tax System* made no mention of taxation of payments generated by either land rights or native title laws. Was this just an oversight? Or is it government policy to treat the income generated by the negotiation leverage provided by these laws as outside the normal workings of the Australian taxation system?

Second, the Consultation Paper is silent on the issue of government revenue, which is normally one driver of new tax regimes. In other words, the Consultation Paper presents the prospect of a new tax of native title payments as somehow being beneficial to native title groups without any mention of the potential revenue stream to government.

Third, the only concrete tax proposal in the Consultation Paper is for a NTWT. It is noted at p.14 that the previous Howard Government announced that it would establish such a tax regime in 1998 but that it did nothing. It is also mentioned that the NTWT was modelled on the Mining Withholding Tax (MWT) introduced in 1979. The Consultation Paper provides no further discussion of the workings of the MWT and makes no mention of numerous published critiques of that tax made in the 1980s and 1990s. This is an issue that I will return to below, but it beggars belief that a new tax regime is being considered that might be modelled on a regime that has been widely criticised as being both inequitable and inefficient.

PCB:

Prescribed Body
Corporate
(also Registered
Native Title Body
Corporate)

NTWT:

Native Title
Withholding Tax

MWT:

Mining
Withholding Tax

2. WHAT ARE THE INTERSECTIONS BETWEEN NATIVE TITLE PAYMENTS AND THE INCOME TAX SYSTEM?

The Consultation Paper notes at the outset that payments can be made to native title groups for a variety of reasons, and that the way these payments are expended could influence tax liability. The schema developed distinguishes between the reasons for payments and the purposes for which payments are applied, noting that benefits might be monetary or non-monetary (pps 2–4). It is noted that some forms of payment might be income tax exempt (for example compensation for extinguishment of native title) while other forms might attract income tax liability (for example for the suspension of native title). It is also noted that if payments are channelled via charitable trusts they will be income tax exempt, although further payments for provision of goods and services and some payments to individuals might subsequently attract income tax liability.

The Consultation Paper notes that native title is a unique legal right and that the area where the taxation system intersects with native title payments is new and complicated and lacks legal precedence; it is therefore uncertain. What the Consultation Paper fails to outline is what practical problems might have arisen in the last 17 years by this indeterminacy, particular during a period when payments under native title agreements have not been taxed.

I make three observations here.

Firstly, native title is a unique legal right, but arguably so are a number of other Commonwealth and state land rights statutory regimes. Overemphasising the uniqueness of native title as a legal right results in historical and policy precedents being ignored. This is especially problematic if native title and land rights overlap. Some of these issues have been addressed in a paper '[Native title compensation: historic and policy perspectives for an effective and fair regime](#)' by J.C. Altman and D.P. Pollack.⁵ Appendix A in that paper also outlines a number of compensation regimes in mining and land rights statutes throughout Australia.

Secondly, by ignoring the extensive earlier literature on the topic and looking to reduce complexity, the Consultation Paper overlooks earlier discussions about the nature of payments, with two crucial issues being:

- whether payments are compensation or a form of revenue (mineral rent sharing)? and
- whether they are public or private?

Without going into great detail, two examples might demonstrate the significance of these added dimensions that could be overlaid on the Consultation Paper's distinction between compensatory payment for native title extinguishment and payment for 'other reasons'.

In most benefit sharing agreements where a right to negotiate can be exercised, benefits include a compensatory element as well as an additional payment (in cash or in kind) that is influenced by the profitability of the mining venture. This dual character of benefit sharing agreements means that at least two reasons for payment might be embedded in the one agreement, with the form of reason potentially attracting different tax liability; as noted in the Consultation Paper. Agreements, however, rarely make the distinction in 'reasons for payment', instead often using a formula linked to royalties or making lump sum payments.

5. CAEPR Discussion Paper No. 152/1998, available at <http://caepr.anu.edu.au/Publications/DP/1998DP152.php>.

Similarly, in some benefit sharing agreements there might be a mix of payments from private and public sources. An example of such an agreement is the Century Mine Agreement signed in 1997, which included a reputed twenty-year benefits package made up of \$60 million from Pasminco (subsequently Zinifex now OZ Minerals) and \$30 million from the Queensland State Government. It could be argued that the treatment of income from these two different sources, especially if tied to particular purposes, might be treated differently, thus potentially increasing both complexity and compliance costs.

Thirdly, there is a strong suggestion in the Consultation Paper that the three approaches outlined (income tax exemption, new tax exempt vehicle and NTWT) might provide a means to re-align incentives through the tax system for the more equitable and productive use of native title payments. This suggestion resonates strongly with the paternalistic approach outlined in the Australian Government's Discussion Paper 'Optimising Benefits from Native Title Agreements', which advocates a regulatory role for the state in ensuring native title payments (whether compensation, revenue or a mix of both) are used productively. As noted in '[A Brief Commentary in Response to the Australian Government Discussion Paper 'Optimising Benefits from Native Title Agreements' and the Report of the Native Title Payments Working Group](#)' (J.C. Altman and K. Jordan), there is a danger that such an approach will not treat native title groups equitably (in comparison with others in Australia who make benefit sharing agreements) nor take into account the social norms and values of native title groups about what might constitute 'productive'.⁶

3. WHAT ARE THE LESSONS TO BE LEARNT FROM THE OPERATIONS OF THE MINING WITHHOLDING TAX?

In this section, I set out to briefly describe the MWT and the various critiques that have been made of it in the literature. I also make recommendation for what else I think we need to know about the workings of the MWT and challenge Treasury to mobilise its considerable capacity to either explore these issues or commission research to do so.

One of the truly disappointing aspects of the Consultation Paper—released when Kevin Rudd was still Prime Minister—is that it does not subscribe to the then supposedly dominant dictum that policy making should be evidence based. This is not intended as a flippant comment, because the only substantive taxation proposal in the Consultation Paper refers to the MWT and its current rate of 4 per cent as a possible model for a NTWT. However, it fails to describe the origins and workings of the tax adequately, fails to allude to an existing literature that is universally critical of the tax at least as it operates in the Northern Territory, and fails to provide any current information about the coverage and efficacy of the MWT Australia-wide—despite being in a privileged position to do so via close bureaucratic relations with the Australian Taxation Office.

In June 1979, under the watch of then Treasurer John Howard, the *Income Tax Assessment Act 1936* was amended to include special provisions for the taxation of payments made in respect of mining operations on Aboriginal land. The rate of taxation was specified in the *Income Tax (Mining Withholding Tax) Act 1979* at 20 per cent of the base personal income tax rate. It is noteworthy that this tax was introduced 13 years

6. CAEPR Topical Issue No. 3/2009, available at <<http://caepr.anu.edu.au/Publications/topical/2009TI3.php>>.

after Aboriginal interests in the Northern Territory first received mining revenues (tax free) through the then Aborigines Benefits Trust Fund (ABTF). It is also noteworthy that this tax was levied retrospectively; that is, it was levied on revenue from mining agreements that had been signed before 1979 without this impost anticipated.

Why did Treasurer Howard introduce this tax? Research into this issue that I have undertaken since 1982 (initially in the book *Aborigines and Mining Royalties in the Northern Territory*) provides two main reasons.⁷ First, the Treasurer did not understand, or was poorly advised by the Department of Finance, that there was limited potential for mining payments to be made to individuals. Second, there was concern at that time that some Aboriginal individuals might operate outside the Australian taxation system, living as they did in very remote situations. Consequently if mining payments were made to such individuals they might avoid tax. A further possibility is that the Commonwealth was keen to recoup at least some of the equivalents of statutory mining royalties that it was paying from consolidated revenue under s.63 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Comm.).

The MWT does two things. First, it has meant that most (at least 70 per cent under ss. 64(1) and (64(3)) mining royalty equivalent payments made out of the Aborigines Benefit Account (ABA) have been reduced since 1979 by an amount of between 4 and 6.4 per cent. This has exacerbated the difficulties of financing administrative costs of running the statutory authorities called Aboriginal land councils (where employees additionally pay income tax); has reduced the compensatory amounts available to traditional owners and residents of areas affected by mining; and has reduced the amounts available for the benefit of Aboriginal people throughout the Northern Territory owing to the need to supplement the ministerially-approved budgets of land councils. Second, the MWT has created additional complexity in the administration of the ABA because while mining royalty equivalents are taxed, the income earned by the ABA on its investments is not. So now there are two forms of payment out of the ABA: taxed and untaxed. The untaxed benefits have invariably applied to or for the benefit of Aboriginal people in the Northern Territory (as s. 64(4) grants) at ministerial discretion, while payments to Aboriginal land councils and incorporated associations in areas affected have been taxed.

A number of amendments to the Aboriginal Land Rights Act have further reduced the likelihood of payment of untied moneys to Aboriginal individuals. The MWT has cost Aboriginal interests in the Northern Territory literally millions of dollars since 1979. The logic of the tax appears both paternalistic and perverse: to ensure that a few Aboriginal individuals did not avoid tax, land councils and areas affected are taxed at source when payments are made out of the ABA. Arguably in many situations the MWT constitutes a form of double taxation, especially when income and goods and services taxes are levied on goods and services purchased with non assessable non exempt income.

These problems with MWT were first raised in some detail in 1984 in a review of the Aborigines Benefit Trust Account that I chaired. where an interagency working group was unanimous in its recommendation that the MWT be abolished.⁸ This recommendation was repeated again on a number of occasions, most

ABTF:

Aborigines
Benefits Trust
Fund

ABA:

Aborigines
Benefit Account

7. *Aborigines and Mining Royalties in the Northern Territory*, J.C. Altman, Australian Institute of Aboriginal Studies, Canberra, 1983.

8. See pp. 229-234 of *Report on the Review of the Aborigines Benefit Trust Account (and related financial matters) in the Northern Territory Land Rights Legislation*, Australian Government Publishing Service, Canberra, 1985.

recently in 1999 in a unanimous report of the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs that recommended 'The equity and efficiency of the Mining Withholding Tax applied to Mining Royalty Equivalents be re-examined with a view to its abolition' (p. 69).⁹

Unfortunately this recommendation was not implemented by the Howard Government, and so the MWT continues to be levied. The latest annual report of the Aboriginals Benefit Account embedded as an appendix in the annual report of the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) for 2008–2009 indicates that about \$4 million of MWT was raised from this source alone.¹⁰ Since amendments to the ALRA in 2006, payments out of the ABA to land councils and areas affected continue to be taxed. Additionally, the cost of s19A township leases and the cost of the statutory Office of the Director of Township Leasing are also borne by the ABA and attract MWT at a rate that appears inexplicably higher than 4 per cent.

In my view, it borders on unconscionable for the Consultation Paper to either be unaware or choose to ignore these historically identified problems with the MWT regime and consider proposing it as the basis for a new NTWT.

I note that my discussion above has only focused on payments of MWT by the ABA. In my view it would be important for the Treasury to examine the following issues among others:

- Is the MWT levied on other mining payments raised on Aboriginal land in the Northern Territory and elsewhere?
- What is the total revenue raised by this tax in the past 30 years?
- How many Aboriginal people and organisations have enjoyed exemption from ordinary income tax after the MWT has been levied; and conversely to what extent has the MWT in combination with ordinary income tax resulted in double taxation of mining payments?
- As asked (but not answered) in the Consultation Paper (p. 14) what overlap currently exists in the land and activities covered by the MWT regime and a possible NTWT?
- What are the enhanced complexity and compliance costs associated with the MWT and what might this mean for a NTWT?

4. WHAT ARE THE LESSONS TO BE DRAWN FOR TAX POLICY MAKING FROM THE RECENT RESOURCES SUPER PROFITS TAX DEBATE?

This paper was completed immediately after a tumultuous week in Australian politics where debate about the introduction of a Resource Super Profits Tax (RSPT) contributed substantially to the downfall of Prime Minister Rudd. It seems that taxation as an issue has a high current profile. So does the process for introducing new tax regimes. In her first press conference on Thursday 24 June 2010, the incoming Prime Minister Julia Gillard indicated that her approach to mining tax reform will focus less on consultation and

RSPT:
Resource Super
Profits Tax

9. *Unlocking the Future: The Report of the Inquiry into the Reeves Review of the Aboriginal Land Rights (Northern Territory) Act 1976*, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of the Commonwealth of Australia, Canberra, 1999, available online at <<http://www.aph.gov.au/house/committee/atsia/reeves/inquiryinf.htm>>.

10. <http://www.fahcsia.gov.au/about/publicationsarticles/corp/Documents/2009_Annual_Report/financial_notes/2_04.htm>, accessed 1 July 2010.

more on negotiation and consensus building. It is hoped that this approach is not just limited as a matter of political expediency to the rich and powerful in Australian society, but also to those such as native title groups who are disadvantaged and marginalised.

It is of concern that the hallmark of policy reform in Indigenous affairs in the post-ATSIC era has seen a familiar pattern with an area for reform identified, a discussion or consultation paper released, submissions invited, and then a decision made without any clear reference to the weight of submission evidence or relative cogency of submission input. This approach has been evident in the way the Community Development Employment Program has been reformed; the way the Northern Territory Emergency Response Intervention was reviewed in late 2008; and the way consultation on the Intervention's continuation has been conducted. From the time of its election in November 2007 the Rudd Government has arguably committed to a top-down and paternalistic approach in Indigenous affairs. This approach is most clearly evident in its overarching Closing the Gap framework, which is primarily a construct of the Federal Government imposed via the COAG National Indigenous Reform Agreement on the States and Territories rather than negotiated with Indigenous Australians.

Perhaps the change in leadership might see a change of approach? For example—and this is what this submission attempts to highlight—evidence-based policy making actually requires some reference to evidence. Evidence can come from the literature or it can come from primary data collection and analysis; or some modelling of the potential impacts of proposed tax regimes like a NTWT. Unfortunately, there is no evidence included in the Consultation Paper, with the only modelling provided being a hypothetical case study (at p.16) with so-called facts and circumstances being entirely abstract.

Policy-making processes in Indigenous affairs have to do better than this. I want to make four brief comments on lessons that might be drawn from current tax reform debates.

1. While the Consultation Paper purports to look at three approaches to tax native title payments—an income tax exemption, a new tax exempt vehicle and a new NTWT—only the last is actually a taxing regime.
2. The NTWT is modelled on the MWT, which has been in operation for 31 years and which has been criticised as inequitable and inefficient for 26 years, but it has never been reviewed or amended. This suggests that bad taxes might be easier to make than unmake, and that extreme caution is needed to make sure the initial framework is based on sound principles.
3. The taxing of native title payments is not about super profits being made by Aboriginal native title groups, but about the compensatory and other payments received through negotiation or arbitration to offset the loss of native title rights and other negative social impacts. Many land use agreements have already been struck and it is imperative that, whatever tax regime might be considered, any prospect of retrospectivity such as occurred with the MWT in 1979 is abandoned.
4. It is important that whatever tax regime might be considered, the incentives effect of such a tax on reaching native title land use agreements is carefully considered. There is already a dominant Indigenous view that returns from such agreements are inadequate without the added impost of a NTWT.

It is my view, based on the weight of evidence, that the MWT regime in the Northern Territory has had negative impacts on the operation of key Aboriginal statutory authorities and incorporated organisations in areas affected and has created compliance difficulties for the ABA. Arguably the MWT regime has also been inequitable and might have resulted in inefficient double taxation. A little like the now-defunct RSPT regime, it provides a model of how not to impose a tax from above without considering intended or unintended consequences.

None of this augurs well for the overarching policy framework of Closing the Gap, especially in remote Australia, where most native title land use agreements are struck and where the gaps appear the widest. Under such circumstances the most rational approach for government that accords with its overall policy framework is to adopt an income tax exemption for native title payments, at least for the foreseeable future until gaps have been statistically closed. At the same time it is clear that many more Indigenous people have now been incorporated into the Australian taxation system (as ATSIC argued in 1997 in its submission to the review of taxes/concessions) than when the MWT was created in 1979. In situations where payments are made to individuals, they should incur an income tax liability like other Australians.

5. CONCLUSION AND RECOMMENDATIONS

This submission has focused primarily on the issue of taxation of native title payments. I am not sympathetic to the proposed use of the tax system to potentially realign incentives to ensure the more productive use of such payments according to some notions of 'productive' defined by dominant mainstream social norms. Nor am I sympathetic to the idea that a NTWT should be modelled on the MWT, which in my view is an inequitable and inefficient 'bad' tax. In this submission I have not provided comment on the deductible gift recipient (DGR) status of Indigenous organisations but would welcome any amendment to the income tax system that allows such organisations to carry out activities across multiple DGR categories so as to enjoy tax benefits.

DGR:

deductible gift
recipient

I conclude with the following recommendations:

1. There is an urgent need to clarify the motivations for this proposed reform and the principles on which such reform might be based. Given the extent of Indigenous disadvantage some consideration could be given to notions of vertical equity (the preferential treatment of those badly off) as well as horizontal equity (the like treatment of those in similar circumstances). Vertical equity might be a useful principle to consider for the tax exemption of native title payments; horizontal equity for the similar income tax treatment of payments to individuals.
2. There is an urgent need to review the operations of the MWT for two reasons. First, such a review might again expose the inequity and inefficiency of this tax that has been highlighted on many previous occasions, and might result in its belated abolition after 31 years. Second, such a review might clarify that the MWT is an unacceptable model for a new NTWT.
3. The recent political debate over the RSPT has highlighted that the powerful in Australian society will not tolerate tax reform based only on consultation after top-down autocratic decision making. It is imperative that any proposal to tax native title payments is based on

proper negotiation and consensus building with native title groups and their representative organisations. The least powerful should be accorded the same negotiation dignity as the most powerful.

4. There is a high degree of variability in the nature of native title agreements and especially in the reasons for payments that usually combine elements of compensation (that would be tax exempt) and of revenue or rent (that would potentially attract a tax liability). Given this variability and indeterminacy it is unlikely that one form of tax like an NTWT would be equitable or effective. There is a strong case for native title payments to be granted an income tax exemption (approach 1 in the Consultation Paper).
5. This is especially the case given the overarching COAG policy framework of Closing the Gap. Granting native title payments an income tax exemption will assist to close the gap, at least in monetary terms. The issue of taxation of native title payments could be revisited once the gap between native title groups and other Australians has been closed.